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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BERNARD J. DOLENZ, M.D., *Petitioner*

vs.

ALL SAINTS EPISCOPAL HOSPITAL, *Respondent*

**Brief in Opposition to
Petition for Writ of Certiorari to
The Supreme Court of Texas**

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QUESTIONS PRESENTED

1. Whether a Petitioner who has failed to follow state procedural rules, and has thus failed to perfect his appeal, presents this Court with a Petition for Writ of Certiorari which may be granted?
2. Whether Fourteenth Amendment concepts of Due Process apply to the recission of a doctor's staff privileges by a private hospital?

RULES OF PROCEDURE

The following state rules of procedure are involved in the resolution of this Petition:

Rule 65. Substituted Instrument Takes Place of Original

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

Rule 371. Record on Appeal Defined

The record on appeal shall consist of a transcript and, where necessary to appeal, a statement of facts.

Vernon's Ann. Rules of Civ. Pro.

STATEMENT OF THE CASE

The Plaintiff's First Amended Petition, filed March 14, 1978, requested injunctive relief for the Petitioner to be placed back on the medical staff of the Respondent, and also sought damages for slander. A Temporary Restraining Order was not issued. The Respondent filed its Motion for Summary Judgment regarding the Petitioner's suit to be placed back on its medical staff. The Trial Court on May 2, 1978, entered a Partial Summary Judgment denying the Petitioner's prayer for injunctive relief to be reinstated upon the medical staff and finally releasing and discharging the Respondent from all claims by the Petitioner to be readmitted to that staff. In the Partial Summary Judgment, the Trial Court stated that the

Motion was being granted after considering the Motion for Partial Summary Judgment, the pleadings and the depositions on file (see Appendix A).

Subsequently, the Petitioner amended his pleadings and dropped any claim for injunctive relief or to be readmitted to the staff of the Respondent hospital. This case then went to trial solely on Petitioner's claim for slander against Respondent. At the close of Petitioner's evidence on his claim for slander, the Trial Court granted Respondent's Motion for Instructed Verdict and for rendition of a take nothing judgment. The Trial Court rendered a take nothing judgment in favor of Respondent on August 24, 1981; that take nothing judgment recited the fact of the rendition and entry of the earlier partial summary judgment.

Petitioner then appealed the take nothing judgment awarded against him. As reflected by the Transcript (Appendix C), the record in that appeal did not contain the depositions on file at the time of the granting of the Partial Summary Judgment, nor the Respondent's pleadings on file at the time of the granting of the Partial Summary Judgment, nor the Motion for Partial Summary Judgment, incorporating Affidavits (see Appendix C).

The Texas Court of Civil Appeals at Fort Worth affirmed the partial summary judgment denying Petitioner reinstatement to Respondent's medical staff; in so doing, the Texas Court of Civil Appeals at Fort Worth held that Petitioner had *abandoned* his suit for reinstatement to Respondent's medical staff, because he had gone to trial on amended pleadings which did not contain any

claim for injunctive relief or to be readmitted to Respondent's medical staff (see Appendix B).

The Supreme Court of Texas, without an opinion, affirmed the Court of Appeals Judgment by refusing Petitioner's Application for Writ of Error, with the notation "No Reversible Error."

ARGUMENT

Because the Petitioner has not complied with the proper state procedural rules for taking an appeal, there is no judgment from the highest court of Texas in which a judgment could be rendered; hence, there is no basis for this Court exercising jurisdiction over this case by writ of certiorari. Alternatively, this Court should deny Petitioner's Writ for Certiorari because the Fourteenth Amendment concepts of due process do not apply to private hospitals in rescinding a doctor's staff privileges.

A. Lack of a Judgment from the Highest State Court in Which a Judgment Could Be Rendered, and Independent State Ground for Upholding Decisions Below.

When the Petitioner does not comply with the proper state procedural rules for taking an appeal, the case he brings to this Court "stands as though no appeal had been prosecuted from the judgment rendered by the trial court." *Newman v. Gates*, 27 S.Ct. 220, 223, 204 U.S. 89, 95, 51 L.Ed. 385 (1907), and there exists no judgment from the highest state court in which a judgment could be rendered; thus, there is no basis for this Court to entertain a Petition for Writ of Certiorari. Furthermore, there exists an independent state ground, separate and

apart from any Federal question or issue, which would uphold the judgment rendered below. See *Ellis v. Dixon*, 75 S.Ct. 850, 349, U.S. 458, 99 L.Ed. 1231 (1955), in which the state courts denied leave to appeal on the ground that the pleadings were not a sufficient record to adjudicate the constitutional issues involved.

In the case on which the Petitioner petitions the Court to issue a Writ of Certiorari, the Petitioner has failed to follow the proper procedural rules in two respects: (1) he abandoned his Due Process claims for reinstatement to Respondent's medical staff by going to trial on amended pleadings which did not affirmatively state that claim; and (2) he failed to include in the record sent to the appellate court the Motion for Partial Summary Judgment which the Trial Court granted, and the pleadings, depositions and affidavits which served as the basis for the Trial Court's ruling on that Motion.

1) Abandonment of Claim

After the Trial Court granted the Respondent's Motion for Partial Summary Judgment, the Petitioner amended his pleadings on two occasions. Those amendments did not carry forward or adopt the Petitioner's claim for injunctive relief to be readmitted to the staff of the Respondent hospital.

As the Court of Civil Appeals held in its opinion, the filing of the amended pleading superceded all of the Petitioner's prior pleadings. Vernon's Ann. Rules of Civ. Pro., rule 65; *Gage v. Langford*, 615 S.W.2d 934, 940 (Tex.Civ.App.-Tyler 1981, writ ref., n.r.e.). In *Gage v. Langford*, *supra*, the plaintiff alleged a cause of action

under the Texas Deceptive Trade Practices Act. The defendant filed special exceptions to that pleading which were sustained by the trial court. Thereafter, the plaintiff filed amended pleadings deleting any mention of a claim under the Texas Deceptive Trade Practices Act. On appeal, the plaintiff claimed that the trial court committed error in sustaining the defendant's special exceptions. The Court of Civil Appeals held that the plaintiff, by filing the amended pleadings, had abandoned any claim under the Texas Deceptive Trade Practices Act and could not complain on appeal of the trial court's rulings on the special exceptions.

In the case at bar, the Petitioner abandoned his claims for injunctive relief to be readmitted to the medical staff of the Respondent hospital by removing any request for such relief from his pleadings.

2) Failure to File Sufficient Transcript

By Summary Judgment, the Trial Court denied the Petitioner's requested injunctive relief to be returned to the Respondent's medical staff.

The Petitioner had the burden, in the appellate courts of Texas, of presenting a record which shows that the Trial Court's Judgment, or the fact findings supporting that Judgment, were erroneous in order to obtain a reversal. *Englander Company v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968). That record consists of the Transcript. Vernon's Ann. Rules of Civ. Pro., rule 371. The Trial Court's Partial Summary Judgment stated that it was based upon the pleadings, depositions and Motion for Summary Judgment. That Motion incorporated Affi-

davits. Neither the Respondent's pleadings at the time the Summary Judgment was granted, nor the depositions on file, nor the Motion for Partial Summary Judgment were brought forward by Petitioner to any appellate court (see Transcript Index, Appendix C). Without a proper record, appellate courts could not say that the Trial Court erred in granting the Respondent's Partial Summary Judgment. *Ratcliff v. Bruce*, 423 S.W.2d 614 (Tex.Civ.App.-Houston 1968, writ ref., n.r.e., cert. denied 89 S.Ct. 134, 393 U.S. 848, 21 L.Ed.2d 118, rehearing denied 89 S.Ct. 373, 292 U.S. 956, 21 L.Ed.2d 369); *Kelley v. Kelley*, 575 S.W.2d 612, 615 (Tex.Civ.App.-San Antonio 1978, writ ref., n.r.e.). Where a partial record fails to disclose error, the reviewing court would not presume that the omitted part of the record showed error. *Nagelson v. Fair Park National Bank*, 351 S.W.2d 925, 929 (Tex.Civ.App.-Dallas 1968, writ ref. n.r.e.).

B. Lack of Merit to Petition for Writ of Certiorari

Fourteenth Amendment Concepts of Due Process Do Not Apply to a Private Hospital in Recission of a Doctor's Staff Privileges

In regard to this issue, it has been held that an individual must have been deprived of his rights by "state action" before he will be entitled to equal protection and due process rights as guaranteed by the United States Constitution. In order for this "state action" to exist, it has been held that there must be "a sufficiently close nexus between the State and the . . . [private defendant] so that the actions of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison*

Company, 419 U.S. 345, 351; 95 S.Ct. 449; 42 L.Ed. 477 (1974).

In one case in which a private hospital's rules concerning elective abortions was challenged as violative of the Fourteenth Amendment, it was held that the County which provided financial support to the hospital was not sufficiently connected with the hospital's activities "to imbue those actions [of the hospital] with the attributes of the State." *Greco v. Orange Memorial Hospital*, 513 F.2d 873, 882 (5th Cir. 1975). The hospital in *Greco* received financial support both from the Federal and County Governments, and was required by the County, pursuant to the County's lease of land to the hospital, to admit indigents, to provide yearly financial reports to the County Auditor, and to get County approval before disposing of hospital property. Despite these involvements with Governmental bodies, the *Greco* Court stated "[T]here is no evidence that in acquiring Federal Funds or in leasing the hospital facility the corporation ever accepted a condition relating to the performance or nonperformance of abortions." *Greco, supra*, at 881.

It has been held that a doctor who was permanently discharged without notice or a hearing from the staff of a private non-profit hospital was not the victim of "state action" under the Fourteenth Amendment. *Madry v. Sorel*, 558 F.2d 303, 304 (5th Cir. 1977). The Court reached this holding despite the fact that the hospital was the recipient of publicly raised funds and Federal Hill-Burton funds, because "the receipt of financial assistance, in and of itself, is not a sufficient nexus to make the acts of the hospital equal to the acts of the State." *Madry, supra*, at 305. Other Courts have also held that

the receipt of Hill-Burton Act Funds does not make the private hospital's acts the acts of the State. *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (4th Cir. 1982); *Cardio-Medical Associates v. Crozer-Chester Medical Center*, 50 L.W. 2568 (D.C.Pa. 3/15/82). Additionally, it was held in *Modaber* and *Crozer-Chester* that the receipt by a private hospital of Medicaid and Medicare funds does not make that hospital's actions the actions of the State for the purposes of the Fourteenth Amendment to the United States Constitution.

The only factual grounds which Petitioner asserts as demanding that Due Process should apply to his removal from Respondent's medical staff is that Respondent has received Hill-Burton Funds and Medicare. As was decided in *Madry, supra*, this does not make Respondent's acts the acts of the State, and hence the Fourteenth Amendment Due Process clause does not apply to Petitioner's removal from Respondent's medical staff.

CONCLUSION

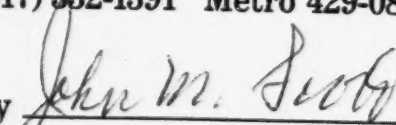
The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By

A handwritten signature in cursive script, appearing to read "John M. Scott", is written over a horizontal line.

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